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No. 84-289

# In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID MENDIA, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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15 pp

## QUESTIONS PRESENTED

1. Whether petitioner's Fourth Amendment rights were violated by the search of a package found in an associate's car.

2. Whether the district court properly denied petitioner's request for "judicial immunity" for a defense witness.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is reported at 731 F.2d 1412.

### JURISDICTION

The judgment of the court of appeals was entered on April 27, 1984. A petition for rehearing was denied on June 22, 1984 (Pet. App. B1). The petition for a writ of certiorari was filed on August 20, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a non-jury trial on stipulated facts in the United States District Court for the Southern District of California, petitioner was convicted of conspiring to possess heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A4).

1. The evidence at the suppression hearing showed that on March 3, 1982, co-defendant Anatolio Madrid Cabrales sold an ounce of heroin to DEA undercover agent Antonio Huertas. On March 4, Madrid told government informant Jose Angel Camacho that he was going to pay petitioner for the heroin that he had sold to Huertas. Later that day, DEA agents saw Madrid meet with petitioner at a shopping center parking lot. E.R. 58-59.[1]

On April 1, 1982, Madrid delivered 20 ounces of heroin to Camacho and told him that the selling price was $137,000. On April 12, Camacho gave the heroin to Huertas, who conducted a chemical test of the substance and photographed it. The next day Huertas gave the heroin back to Camacho and told him to return it to Madrid and explain that there would be a delay in the transaction. Approximately one hour later, Madrid went to Camacho's residence to retrieve the heroin and took it to his apartment. Pet. 3-4; Tr. 8; E.R. 59.

Shortly thereafter, petitioner entered Madrid's apartment. Petitioner soon left the apartment and drove in his car to a nearby shopping center. DEA agents observed petitioner park his car and go into a camera shop. At approximately 2:15 p.m., a DEA agent entered the shop and saw that petitioner was looking around nervously and had large bulges in both of his front pockets. Pet. 4; E.R. 59-60.

A few minutes later, petitioner left the camera shop and went to an adjacent bar. DEA agents noticed that petitioner no longer had bulges in his front pockets. The agents believed that petitioner was waiting for someone, because

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[1]"E.R." refers to petitioner's excerpts of record filed in the court of appeals.

he kept looking at the entrance to the bar, and that petitioner was aware of the surveillance. Pet. 4; Tr. 42, 50-51; E.R. 60.

At approximately 5:45 p.m., Michael Leon Bronk arrived at the bar. Petitioner immediately went up to Bronk and gave him money for a telephone call. After spending a few minutes in the bar, petitioner and Bronk left at approximately 6:00 p.m. Pet. 4; Tr. 43; E.R. 60.

Upon leaving the bar, petitioner and Bronk walked over to petitioner's car. Petitioner opened the hood and then, while Bronk remained by the car, entered the camera shop. After being in the camera shop for approximately two minutes, petitioner returned to the parking lot. He and Bronk then went to Bronk's car, where Bronk opened the trunk and threw a light colored object inside. At that point, Bronk drove away in his car, leaving petitioner in the parking lot. Pet. 4; Tr. 25; E.R. 60.

Soon after he left the shopping center, Bronk was stopped by the local police at the request of the DEA agents. The police found the 20 ounces of heroin in a bright yellow plastic bag in the trunk of Bronk's car. Pet. 4; Tr. 7, 25-26, 28; E.R. 60.

2. Neither petitioner nor Bronk testified at the suppression hearing. The district court denied petitioner's motion to grant judicial immunity to Bronk as a defense witness.

Based on the record at the suppression hearing, the district court rejected petitioner's motion to suppress the heroin located in Bronk's car. The court found that petitioner had no reasonable expectation of privacy in the package of heroin because he had transferred it to Bronk and thus lost control over it (Tr. 55-56).

3. The court of appeals affirmed (Pet. App. A1-A4). The court upheld the district court's finding that petitioner had abandoned any reasonable expectation of privacy he might

have had by transferring the package to Bronk and maintaining no control over it (*id.* at A2-A3). The court also concluded that the district court had correctly denied petitioner's request for judicial immunity for Bronk to testify as a defense witness on the issue of "standing" at the suppression hearing (*id.* at A3-A4).

**ARGUMENT**

1. Petitioner contends (Pet. 6-9) that he had a reasonable and legitimate expectation of privacy in the bag of heroin that was found in the trunk of Bronk's car.[2] However, the district court found on the facts of this case that petitioner relinquished any privacy interest when he delivered the bag to Bronk and made no effort to keep control of it, which finding was sustained by the court of appeals. This fact-bound ruling is correct and in any event does not warrant further review.

Petitioner disputes the lower courts' findings on the ground that the DEA agents "knew" that Bronk was a "mule" who would eventually return the heroin to petitioner. However, as the district court recognized (Tr. 55-56), any such "subjective intent" on petitioner's part would not establish a reasonable expectation of privacy during the time that "sole control was with Bronk." At any rate, the record fails to support petitioner's assertion. Petitioner did not testify at the suppression hearing even though his privilege against self-incrimination would have been protected under *Simmons* v. *United States*, 390 U.S. 377 (1968); see also *United States* v. *Salvucci*, 448 U.S. 83, 89-90 (1980). Having failed to avail himself of the opportunity to explain any "arrangement" with Bronk, petitioner cannot now claim that he had an expectation of privacy based on an

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[2]Petitioner does not and could not argue that he had any privacy interest in Bronk's car itself. See *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

assumption that the agents knew that Bronk was only a temporary "mule."[3]

2. Petitioner also argues (Pet. 9-11) that the district court erred in not judicially immunizing Bronk as a prospective defense witness at the suppression hearing. He concedes (Pet. 5, 9) that he never asked the district court to dismiss the indictment or to order the government to grant immunity under 18 U.S.C. 6001 *et seq.*, and thus his sole claim is that the district court has inherent immunity power that should have been exercised in this case. Petitioner's argument is without merit.

The decision whether or not to confer immunity on a witness is entrusted to the Executive Branch and is ill-suited for consideration by the courts. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 11; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 254, 261-262 (1983). The courts of appeals have overwhelmingly concluded that the judiciary is not authorized to immunize witnesses, and this Court has consistently declined review.[4]

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[3]We also believe that, even if petitioner had "standing," the heroin seized from Bronk's car was admissible against him. Despite his pejorative characterization (see Pet. 4), petitioner plainly has no standing to challenge the seizure of Bronk entailed in the stop of his car. Moreover, as outlined above (see pages 2-3, *supra*), there was ample probable cause to believe that the car contained heroin. In these circumstances, under *United States* v. *Ross*, 456 U.S. 798 (1982), the search of the bag contained in the trunk of Bronk's car was proper and did not violate petitioner's or Bronk's Fourth Amendment rights.

[4]See, *e.g.*, *United States* v. *Todaro*, No. 84-1086 (2d Cir. Sept. 11, 1984), slip op. 6201-6205; *United States* v. *Pennell*, No. 83-1243 (6th Cir. June 8, 1984), slip op. 7-13; *United States* v. *Taylor*, 728 F.2d 930, 933-936 (7th Cir. 1984); *United States* v. *Gottesman*, 724 F.2d 1517, 1523-1524 (11th Cir. 1984); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir. 1983), cert. denied, No. 82-6986 (Nov. 28, 1983); *Autry* v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, No. 83-5720 (Mar. 13, 1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Hunter*,

As petitioner points out (Pet. 9), the Third Circuit has held that district courts have the authority to order immunity for prospective defense witnesses in exceptional circumstances. See *Government of Virgin Islands* v. *Smith*, 615 F.2d 964 (3d Cir. 1980). The Third Circuit stands alone in so holding and, as noted above, this Court has repeatedly declined to review the issue notwithstanding the divergent view of the Third Circuit; no different result is called for here.[5]

Moreover, even under the Third Circuit's standard, petitioner could not prevail. By its terms, the Third Circuit's rule is applicable only where, among other requirements, "the defendant * * * make[s] a convincing showing * * * that the testimony which will be forthcoming is both clearly exculpatory and essential to the defendant's case."

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672 F.2d 815, 818 (10th Cir. 1982); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *L'Hoste*, 640 F.2d 693, 695 (5th Cir. 1981); *United States* v. *Herbst*, 641 F.2d 1161 (5th Cir.), cert. denied, 454 U.S. 851 (1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *United States* v. *Klauber*, 611 F.2d 512, 517-520 (4th Cir. 1979), cert. denied, 446 U.S. 908 (1980); *United States* v. *Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978), cert. denied, 440 U.S. 947 (1979); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir), cert. denied, 426 U.S. 948 (1976); *Thompson* v. *Garrison*, 516 F.2d 986, 988 (4th Cir.), cert. denied, 423 U.S. 933 (1975); *United States* v. *Allstate Mortgage Corp.*, 507 F.2d 492, 494-495 (7th Cir.), cert. denied, 421 U.S. 999 (1974); see also Note, *The Case Against a Right to Defense Witness Immunity*, 83 Colum. L. Rev. 139 (1983).

[5]Petitioner's assertion of an intra-circuit conflict within the Ninth Circuit (Pet. 9-10) also does not call for this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

*Government of Virgin Islands* v. *Smith*, 615 F.2d at 972. Thus, there must be "a probable certainty that * * * [the] expected testimony * * * would * * * *in itself* exonerate [the defendant]." *United States* v. *Lowell*, 649 F.2d 950, 965 (3d Cir. 1981). See also *United States* v. *Bazzano*, 712 F.2d 826, 851 (3d Cir. 1983) (en banc) (Adams, J., dissenting from the judgments of affirmance). Here, Bronk's testimony would have related merely to petitioner's "standing" to seek the suppression of evidence, not to his guilt or innocence of the charges against him. Cf. *McCray* v. *Illinois*, 386 U.S. 300 (1967); compare *Roviaro* v. *United States*, 353 U.S. 53 (1957). In addition, Bronk's testimony was hardly essential since, under *Simmons* v. *United States*, *supra*, petitioner himself was free to testify at the suppression hearing about the existence and nature of any arrangement he had with Bronk. And in any event the district court's ruling suggests that petitioner's motion to suppress would have been denied even if Bronk had testified about an agreement to return the heroin to petitioner at some later time (see Tr. 55-56). Thus, this case is a far cry from the unique situation in *Smith*, in which the Third Circuit found judicial immunity for a defense witness to be appropriate.[6]

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[6]In *Smith*, the defendant requested the court to confer immunity on an exculpatory witness, a juvenile subject exclusively to the jurisdiction of local Virgin Islands authorities. The local authorities offered the witness immunity, but, as a matter of prosecutorial courtesy, stated that the offer was conditional on the consent of the United States Attorney, who inexplicably refused to consent.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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